Supreme Court, U.S.
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No. 88-116

In the

Supreme Court of the United States

OCTOBER TERM 1987

JONATHAN STERN, on behalf of himself and all others similarly situated,

Petitioner,

v.

LEUCADIA NATIONAL CORPORATION, LNC INVESTMENTS, INC., CHARTER NATIONAL LIFE INSURANCE COMPANY, AMERICAN INVESTMENT COMPANY, LEUCADIA INC., UINTAH NATIONAL CORP., TLC ASSOCIATES, CARL MARKS & CO., INC., IAN N. CUMMING, JOSEPH S. STEINBERG, CUMBERG, INC., MARKS INVESTING CORP. and S & S SECURITIES, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

I. The cases themselves specifically state that there is a conflict between the Second Circuit's stringent application of Rule 9(b) and the interpretation of Rule 9(b) by the other circuits 1

TABLE OF AUTHORITIES

Cases Cited:

Christidis v. First Pennnsylvania Mortgage Trust, 717 F.2d 96 (3d Cir. 1983) 1, 2

Citizens State Bank v. The Federal Deposit Insurance Corp., 639 F. Supp. 758 (W.D. Okla. 1986) 4

In re U.S. Healthcare, Inc. Securities Litigation, 1988 U.S. Dist. Lexis, p. 9 (E.D. Pa.) 2

In re Washington Public Power Supply System Securities Litigation, 623 F. Supp. 1466, 1471 (W.D. Wash. 1985) 3

Kitchens v. U.S. Shelter Corp., [1984-85 Transfer Binder] Fed.Sec.L.Rep. (CCH), ¶91,838, p. 90,200 (D.S.C. 1984) 3

McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226 (1st Cir. 1980) 4, 5

Statutes Cited:

Fed. R. Civ. P. Rule 9(b) ..... *passim*

Other Authorities:

Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433, n. 7 (1984) 4

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I.

The cases themselves specifically state that there is a conflict between the Second Circuit's stringent application of Rule 9(b) and the interpretation of Rule 9(b) by the other circuits.

Respondents assert that the Second Circuit's interpretation of Rule 9(b) is applied in other circuits and that, therefore, there is no conflict between the circuits. However, the cases themselves acknowledge the conflict.

Thus, in *Christidis v. First Pennnsylvania Mortgage Trust*, 717 F.2d 96 (3d Cir. 1983), the Third Circuit specifically stated:

"The defendants, relying on certain cases decided in the Second Circuit, urge that we should read Rule 9(b) as a special pleading rule designed to facilitate the disposition, before discovery, of what they refer to as strike suits in the securities industry. We find more appropriate guidance, however, closer to home. . . . (*Id.*, at 99)

* * *

"In applying the first sentence of Rule 9(b) courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud. Moreover, in applying the rule, focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.' 5 C. Wright & A. Miller, Federal Practice and Procedure § 1298, at 407 (1969)." (*Id.*, at 99-100)

There are numerous similar statements by the district courts, such as:

" . . . the decisions of the courts in the Second Circuit are distinguishable in light of the fact that the courts of this circuit [the Third] have rejected the stringent standard adopted by the Second Circuit. See, *Recchion v. Westinghouse Electric Corp.*, 606 F. Supp. 889, 894 (W.D. Pa. 1985) (noting that 'this circuit appears to temper the quantum of specificity demanded by the Second Circuit' under Rule 9(b)." *In re U.S. Healthcare, Inc. Securities Litigation*, 1988 U.S. Dist. Lexis, p. 9 (E.D. Pa.)

* * *

"The defendants rely on authority from the Second Circuit, which has dismissed various cases

on the ground of insufficient particularity. See, *Billard v. Rockwell International,* 683 F.2d 51 (2nd Cir. 1982). The Fourth Circuit, however, has refused to adopt these stringent pleading requirements." *Kitchens v. U.S. Shelter Corp.* [1984-85 Transfer Binder] Fed.Sec.L.Rep. (CCH), ¶91,838, p. 90,200 (D.S.C. 1984).

* * *

"In support of their Rule 9(b) arguments, the defendants cite a series of Second Circuit cases that adopt an expansive interpretation of Rule 9(b). See, e.g., *Decker v. Massey Ferguson, Ltd.,* 681 F.2d 111 (1982); *Ross v. A.H. Robins,* 607 F.2d 545 (1979), *cert. denied,* 446 U.S. 946 (1980). The Ninth Circuit has adopted a more relaxed interpretation of the requirements of Rule 9(b) that is more in keeping with the spirit of the liberal federal rule of notice pleading and consistent with Rule 8(a). See, e.g., *Walling v. Beverly Enterprises, supra; Bosse v. Crowell, Collier and MacMillan,* 565 F.2d 602 (1977); *Gottreich v. San Francisco Investment Corp.,* 552 F.2d 866 (1977)." *In re Washington Public Power Supply System Securities Litigation,* 623 F. Supp. 1466, 1471 (W.D. Wash. 1985)

* * *

"Defendants rely heavily on cases from the Second Circuit, especially the Southern District of New York, that have developed extremely stringent pleading requirements. E.g., *Todd v. Oppenheimer & Co., Inc.,* 78 F.R.D. 415 (S.D.N.Y. 1978). However, such a return to 'fact pleading' is far greater than that required in most circuits, including our own [the Tenth], where Rule 9(b) must be read in conjunction with Rule 8's policy of 'notice pleading.' *See generally,* 5 Wright &

> Miller, *Federal Practice and Procedure*, §1298 (1969); Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433 n. 7 (1984)." *Citizens State Bank v. The Federal Deposit Insurance Corp.*, 639 F. Supp. 758, 762 (W.D. Okla. 1986)

Thus, the Note, *Pleading Securities Fraud with Particularity under Rule 9(b)*, 97 Harv. L. Rev. 1432, 1433, n. 7 (1984), states:

> "For the last decade, the Second Circuit has consistently required far greater specificity in pleadings alleging fraud than have other circuits."

In regard to the question of pleading fraudulent intent under Rule 9(b)—the question in this case—the First Circuit, in stating, in *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226 (1st Cir. 1980), the general rule that Rule 9(b) does not require the pleading of circumstances or evidence from which fraudulent intent could be inferred, cited as *contra* a Second Circuit decision. The First Circuit stated (*Id.*, at 228-229):

> "We do not agree that recovery against Lenoci was unwarranted because intent to defraud was inadequately pled. . . . The clear weight of authority is that Rule 9 requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred. *E.g., Cramer v. General Tel. & Elecs. Corp.*, 582 F.2d 259, 272-73 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 90 (1979); *Felton v. Walston & Co.*, 508 F.2d 577, 581-82 (2d Cir. 1974); *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); 5 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 1297, at 403-04, § 1298, at 410, §

> 1301, at 426 (1969 ed.); 2A Moore's Federal Practice ¶9.03, at 9-23 (2d ed. 1979). *Contra, Ross v. A.H. Robins Co.*, 607 F.2d 545, 557-58 (2d Cir. 1979), *cert. denied*, 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed. 802 (1980). This interpretation of Rule 9 comports with its language, harmonizes the rule with Rule 8, which requires that averments in pleadings be concise and direct, and at the same time fulfills a major purpose of Rule 9: to give adequate notice of the plaintiff's claim of fraud or mistake, *see* 5 C. Wright & A. Miller, *supra*, § 1297, at 403-04. Judged by this standard, the complaint here complied with Rule 9(b)."

The Second Circuit's decision in this case is particularly egregious because, although not required by Rule 9(b), the complaint does allege circumstances or evidence supporting petitioner's claim of fraudulent intent. The gravamen of the complaint is that, contrary to its statements and filings, Leucadia never intended to acquire GATX in a merger but instead its purpose was to extract greenmail from GATX or to elicit a higher bid from a third person for GATX. The complaint alleges:

> —Leucadia requested GATX (which had accepted a merger with Leucadia) for an extension of time to complete the merger because, assertedly, it needed additional financing due to the sudden and unexpected discovery that some of GATX's debt would be accelerated because of the merger. Leucadia's request was a pretext because Leucadia had long been in possession of all of GATX's debt documents and the information allegedly suddenly discovered was not new or unusual (Pet. App. B, ¶31).
>
> —GATX publicly stated that it would not grant Leucadia the extension because it believed that

Leucadia's claimed need for an extension was false. (*Id.*, at ¶32).

—Leucadia had a history of greenmail (*Id., at* ¶33).

Stating that "circumstances must be pleaded that provide a factual foundation for otherwise conclusory allegations of scienter" (Pet. App. E., 91a), the Second Circuit proceeded itself to weigh the sufficiency of the factual allegations of the complaint (*Id.*, 91a-93a) and concluded that they did not "pass muster under Rule 9(b)." (*Id.*, 91a). Since the Second Circuit omitted any reference to the pleaded and indisputable fact that GATX itself publicly stated that Leucadia's claimed need for an extension of time was false, the Second Circuit did not explain why GATX, which had earlier accepted the merger proposal, would make such a statement without any basis.

The remainder of respondents' brief devotes itself to arguments respecting the "findings" by the court below, which confirms petitioner's concerns that, under the Second Circuit view of Rule 9(b), not only must the complaint plead the circumstances or evidence of fraudulent intent but also the courts, acting without the benefit of any record whatever, are free to weigh the sufficiency of the factual allegations and, even further, to make their own findings respecting the merits.

Certiorari is required here to resolve a conflict among the circuits upon an important and recurring question of law.

Dated: New York, New York
August 25, 1988

Respectfully submitted,

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